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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GUILLERMO RODRIGUEZ, Defendant and Appellant.	B165828 (Los Angeles County Super. Ct. No. VA069974)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert A Higa, Judge. Modified and affirmed.

A. William Bartz, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

Guillermo Rodriguez appeals from his convictions by jury verdict of murder and vehicular manslaughter. He argues the trial court should have granted his motion for acquittal, challenges the instruction on gross negligence, and contends the trial court should have granted him access to personal juror identification information. We find no basis for reversal. We find merit in the Attorney General's argument that appellant was not entitled to conduct credits because he was convicted of murder and modify the abstract of judgment.

FACTUAL AND PROCEDURAL SUMMARY

Appellant went drinking on the night of March 2, 2003 with his brother, Rene Morales, and a friend, Adrian Rodarte. While under the influence, appellant crashed his car into a sound wall on Interstate 5 early in the morning hours of March 3, 2002. (Stipulation of the parties.) His passenger, Rodarte, died in the collision. A hole in the sound wall caused by the collision measured eight feet by three feet. When interviewed by California Highway Patrol officers at the scene, appellant denied being the driver or being in the car. His blood alcohol level was .24 and he had amphetamine and methamphetamine in his blood as well. After being placed under arrest, appellant repeated his claim that he was not in the car with Rodarte when the crash occurred.

Six weeks after the crash, appellant and a companion went to Rodarte's grave. Rodarte's aunt, Maria Gonzalez, was there with family members. Appellant sat on the grass on Rodarte's grave and appeared to cry. When Gonzalez asked him what had happened on the night of the accident, appellant made the sign of the cross, kissed his hand, and swore on his grandmother that he was going to tell the truth. Twice he said he knew he was going to go to jail.

Appellant said that he had gotten into a fight with people at the club, and that he was upset with his brother not backing him up during the fight. Rodarte said he was not feeling good about being at the club because his son had been in an accident earlier in the day. After being in the club for a while, appellant decided to leave. He found his

brother, but they were not able to find Rodarte. They went out to their car, saw the side window was broken, and found Rodarte lying in the back seat. Appellant and Morales got into the car, with appellant driving. While on the freeway, appellant and Morales got into an argument about Morales' failure to back up appellant during the fight at the club. Morales opened the car door and put his leg out, asking appellant to stop the car. After appellant stopped the car, Morales got out on the freeway.

Rodarte moved up to the front passenger seat and the two drove away. Appellant intended to take Rodarte home, but got lost. They decided to go back to the freeway to pick up Morales. They were unable to find Morales, but saw the people appellant had fought at the club. According to appellant, people from the club started to chase him. He told Gonzalez that he had wanted to exit the freeway, tried to get to the right lane in order to exit, lost control of the car, and hit the sound wall. After giving this information to Gonzalez, appellant made the sign of the cross again and said this was the true account of the accident. When Gonzalez asked appellant why he told the police that Rodarte was driving, appellant said: "Oh, I got confused, and I didn't want to talk to the police officers." Appellant never told Gonzalez that Rodarte had pulled or grabbed at the steering wheel before the accident.

Appellant testified in his own defense. He testified that after his brother got out of the car on the freeway, he and Rodarte pulled off the freeway, parked, and went to look for him. When they did not find his brother, they got back into the car and got onto the freeway. Then Rodarte said he also wanted to get out. Appellant was driving north on Interstate 5 in "[t]he last lane to the right." He told Rodarte he would exit to let him out. According to appellant, Rodarte asked him to let him out right there on the freeway. Appellant was going the speed limit, between 50 and 60 miles an hour. Appellant testified that Rodarte pulled appellant's right arm down. Appellant then lost control of the car, which veered to the right. He tried to steer back but all he remembered was a loud crash. He did not remember the crash, or the car hitting a sign at the side of the

freeway after the crash, or ending up in the No. 3 and 4 lanes of the freeway. Appellant could not recall any statements he made to the highway patrol officers at the scene.

At trial, California Highway Patrol Officer Paul Hill, who responded to the crash scene, testified how the accident happened based on the skid marks, debris, and other physical evidence at the scene. He said appellant's Honda was traveling north in the number four lane (slowest lane), went across the shoulder, hit the sound wall, continued north along the shoulder, and struck a sign. Debris from the wall crossed the traffic lanes and struck the rear of a vehicle parked on the other side of the sound wall on Firestone Boulevard.

In 1996, appellant had pled guilty to a misdemeanor charge of driving under the influence in violation of Vehicle Code section 23152, subdivision (b). In 2001, he pled guilty to a new charge of driving under the influence in violation of Vehicle Code section 23152, subdivision (a). Appellant was ordered to complete a 90-day treatment program for the 2001 offense. He was still on probation for the 2001 offense when this crash occurred. The conditions of probation prohibited him from being at a location where alcohol was served, from driving except to work or to his alcohol program, or driving at all while drinking. As a condition of probation, appellant was directed to enroll in and complete a course about drinking and driving. At the time of the crash, he knew it was illegal to drink and drive. He knew that it was dangerous to drink and drive. He knew drinking and driving could result in death.

Appellant was charged and convicted of second degree murder in violation of Penal Code section 187, subdivision (a)[1] and gross vehicular manslaughter while intoxicated in violation of Penal Code section 191.5, subdivision (a). The jury found true allegations that appellant had suffered two prior convictions for driving under the influence. Appellant was sentenced to a term of 15 years to life on the manslaughter

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[1] Statutory references are to the Penal Code unless otherwise indicated.

count and sentencing on the murder count was stayed under section 654. He filed a timely appeal.

DISCUSSION

I

Appellant argues the trial court should have granted his motion for a directed verdict of acquittal on both the murder and vehicular manslaughter counts under section 1118.1.

"Under Penal Code section 1118.1 the court 'shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal.' '[T]he "test to be applied by the trial court under the section is . . . the same test applied by an appellate court in reviewing a conviction: whether from the evidence, including reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged [citations]." [Citations.]' (*People v. Lines* (1975) 13 Cal.3d 500, 505 [119 Cal.Rptr. 225, 531 P.2d 793]; *People v. Cuevas* (1995) 12 Cal.4th 252, 261 [48 Cal.Rptr.2d 135, 906 P.2d 1290].) Substantial evidence is 'evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]' (*People v. Stanley* (1995) 10 Cal.4th 764, 792 [42 Cal.Rptr.2d 543, 897 P.2d 481].)" (*People v. Allen* (2001) 86 Cal.App.4th 909, 913-914.)

" '[M]alice is implied "when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." [Citation.]' (*People v. Lasko* (2000) 23 Cal.4th 101, 107 [96 Cal.Rptr.2d 441, 999 P.2d 666].)" (*People v. Robertson* (2004) 34 Cal.4th 156, __, [17 Cal.Rptr.3d 604, 610].) "'[I]mplied malice, . . . has both a physical and a mental component. . . . The mental component is the requirement that the defendant "knows that

his conduct endangers the life of another and . . . acts with a conscious disregard for life." . . . .'" (*Id*. at p. ___ [17 Cal.Rptr.3d at pp. 610-611].)

Historically, the principles of implied malice have been applied to defendants charged with second degree murder arising from a fatal automobile accident caused by drunken driving. "At least since 1981, when our Supreme Court affirmed a conviction of second degree murder arising out of a high speed, head-on automobile collision by a drunken driver that left two dead, California has followed the rule in vehicular homicide cases that 'when the conduct in question can be characterized as a wanton disregard for life, and the facts demonstrate a subjective awareness of the risk created, malice may be implied . . . .' (*People v. Watson* (1981) 30 Cal.3d 290, 298 [179 Cal.Rptr. 43, 637 P.2d 279].) In such circumstances, 'a murder charge is appropriate.' (*Ibid.*) So-called implied malice second degree murder, the *Watson* court explained, is committed 'when a person does '"'an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life"' . . . ." [Citations.] Phrased in a different way, malice may be implied when [a] defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life.' (*Id.* at p. 300.) '[A] finding of implied malice,' Justice Richardson went on to write for the majority, 'depends upon a determination that the defendant *actually appreciated* the risk involved, i.e., a *subjective* standard.' (*Watson*, at pp. 296-297.)" (*People v. Ortiz* (2003) 109 Cal.App.4th 104, 109-110, fn. omitted.)

In *Watson*, the leading case, the Supreme Court found the evidence sufficient to warrant a charge of second degree murder based on implied malice. Defendant had consumed enough alcohol to become legally intoxicated (.23 percent), drove his car to the establishment where he had been drinking, and must have known he would have to drive later. The court presumed the defendant was aware of the hazards of driving while intoxicated. (*People v. Watson, supra*, 30 Cal.3d at p. 300.) The court observed: "'One who willfully consumes alcoholic beverages to the point of intoxication, knowing that he

thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, *reasonably may be held to exhibit a conscious disregard of the safety of others*.'" (*Id.* at pp. 300-301, quoting *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 897, emphasis added.)

The *Watson* court went on to cite the defendant's conduct in driving through city streets at excessive speeds, his near collision with another vehicle after running a red light, and his belated attempt to brake before the fatal crash as "suggesting an actual awareness of the great risk of harm which he had created." (*People v. Watson, supra*, 30 Cal.3d at p. 301.) These facts in combination supported a conclusion that the defendant had acted wantonly and in conscious disregard for human life. (*Ibid.*)

Appellant argues that awareness of the dangers of drunk driving is not enough to support a finding of implied malice. If it were enough, he reasons, all vehicular homicides while driving could result in a murder conviction. He contends there must be evidence that the defendant was "actually and subjectively aware that his own situation at the time he drove was such as to pose a danger to life. This requires some objective indication at the same time of the driving that the defendant was aware that his driving was such as to pose a danger to life."

In support of this argument, appellant cites a series of vehicular murder cases in which implied malice was found after the defendant had been informed of the dangers of his driving. He relies on *People v. Watson*, *supra*, 30 Cal.3d 290, which we have discussed, where the defendant ran a red light and narrowly avoided a collision shortly before the fatal collision; *People v. Autry* (1995) 37 Cal.App.4th 351 [three near misses before fatal accident, two passengers asked to let them drive and to slow down]; *People v. Talamantes* (1992) 11 Cal.App.4th 968 [defendant's car became airborne when crossing railroad tracks before driving on wrong side of street at time of fatal collision]; *People v. Jarmon* (1992) 2 Cal.App.4th 1345 [defendant sideswiped several cars and sped on heavily trafficked streets before collision]; *People v. David* (1991) 230 Cal.App.3d 1109 [defendant sped on city streets, ran red lights, traveled on wrong side of

street and evaded pursuing officer]; *People v. Murray* (1990) 225 Cal.App.3d 734 [near collisions, u-turn across all lanes of freeway, driving wrong way on freeway, sideswiping car]; *People v. Ricardi* (1990) 221 Cal.App.3d 249 [defendant crossed center divider, struck road sign, had prior conviction for drunk driving that involved injury to another driver]; *People v. McCarnes* (1986) 179 Cal.App.3d 525 [reckless passing at high rate of speed into oncoming traffic]; *People v. Albright* (1985) 173 Cal.App.3d 883 [speeding at 100 miles an hour, passing multiple cars in residential area]; *People v. Olivas* (1985) 172 Cal.App.3d 984 [defendant evaded police pursuit, near collisions with two cars, struck car during chase].

Appellant distinguishes these cases because, in his case, he argues, there was no evidence of erratic driving, no report of danger by others on the road, no excessive speed, nor traffic violations. In addition, he contends the line between implied malice that supports a second degree murder conviction and gross negligence for manslaughter is a fine one, with a subjective test applied to the first, and an objective test to the second.

We agree that the cases cited by appellant are distinguishable in that each involved a pattern of traffic violations, collisions, near-misses, or other incidents before the fatal collisions which gave the defendant notice that his driving was not only impaired, but dangerous. But the fact that this evidence was sufficient in each to support a finding of implied malice does not lead to a conclusion that an actual or near mishap is *required*.

Here, appellant had two prior convictions for driving under the influence and was on probation for the most recent at the time of this crash. Under the conditions of probation, he was ordered to avoid places that served alcoholic beverages, was to drive his car to work or to his alcohol program only, and was not to drive after drinking. Appellant violated all of these conditions when he chose to drive to the club; used methamphetamines; drank to excess, raising his blood alcohol to .24 percent; and then drove his car on leaving the club. He admitted that he knew drunk driving was dangerous and that people are killed as a result of such behavior.

We note that appellant's brother demanded to be let out of the car while on the freeway, and that Rodarte made the same demand after he got into the passenger seat. Significantly, appellant's car traveled from the slowest lane of the freeway across the adjoining shoulder to hit the masonry block sound wall with sufficient force to knock an eight by three foot hole into the wall. Appellant's effort to convince the investigating officers that he was not the driver of the car supports an inference that he was aware that he was intoxicated.

In an attempt to discount the significance of his prior convictions and his alcohol education program, appellant argues that neither of his prior convictions involved injury to others or to his vehicle. But the prosecution presented the testimony of Elizabeth Urrutia, who was an employee of the second-offender alcohol treatment program[2] appellant was supposed to be attending at the time of the crash. Appellant had not completed the requirements of the course, and had stopped attending in January 2002. Sergio Campos, an instructor in appellant's alcohol treatment program, testified that sessions of the program attended by appellant discussed the dangers of drinking and driving.

Appellant's history of drunk driving offenses and treatment, his violation of the terms of his probation on the night of the accident, his blood alcohol level and positive drug tests, the extensive damage to his car and to the freeway sound wall, and his efforts to conceal his role as driver from investigating officers, are substantial evidence to support the jury's conclusion that the subjective standard for implied malice was satisfied.

II

Appellant also argues the evidence is not sufficient to establish the gross negligence required to support his conviction for gross vehicular manslaughter in violation of section 191.5, subdivision (a).

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[2] This is referred to as an "SB 38" program.

"'Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.' (Pen. Code, § 191.5, subd. (a).) [¶] The elements of Penal Code section 191.5 are: (1) driving a vehicle while intoxicated; (2) when so driving, committing some unlawful act, such as a Vehicle Code offense with gross negligence, or committing with gross negligence an ordinarily lawful act which might produce death; and (3) as a proximate result of the unlawful act or the negligent act, another person was killed." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1159.)

The jury was instructed on the prosecution's theory that the manslaughter occurred in the course of an unlawful act not amounting to a felony, an unsafe turning movement in violation of Vehicle Code section 22107. That statute provides: "No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided by this chapter in the event any other vehicle may be affected by the movement."

Appellant argues there is no evidence that he was speeding or that he failed to signal in executing a turning movement. He asserts that his case is similar to *People v. Thurston* (1963) 212 Cal.App.2d 713. In that case, the defendant and his passenger got very drunk one evening. The defendant was driving them when he collided with a parked car, injuring the passenger. No one witnessed the accident or the manner in which the defendant was driving. The defendant argued there was no evidence that he had committed any Vehicle Code violation, including an unsafe turn under section 22107. The Court of Appeal agreed that the collision itself did not establish that the defendant had made any unlawful turning movements. (*Id.* at p. 717.)

Appellant's argument that his collision with the sound wall is similar to the collision in *Thurston* is not consistent with the evidence. Unlike the collision in that case, with parked cars on a city street, appellant's vehicle had to travel over the shoulder of a freeway to impact the sound wall. If appellant had not "turned a vehicle from a direct course" as set out in Vehicle Code section 22107, no collision with the sound wall would have occurred. In addition, Officer Hill testified that appellant's Honda sustained severe damage "from the front, about the midline, through the engine compartment, and was torn through the right side just behind the door." The damage was primarily to the right front quarter area of the vehicle. It is difficult to imagine how appellant's Honda sustained such damage unless appellant had turned the vehicle from a direct course in violation of Vehicle Code section 22107.

There was substantial evidence that appellant violated Vehicle Code section 22107 in circumstances constituting vehicular manslaughter under section 191.5, subdivision (a).

III

Appellant challenges the instruction on gross vehicular manslaughter on the ground that it failed to inform the jury that gross negligence requires a conscious indifference to the consequences of the defendant's act.

CALJIC No. 3.36, the pattern instruction on gross negligence, was given: "'Gross negligence' means conduct which is more than ordinary negligence. Ordinary negligence is the failure to exercise ordinary or reasonable care. 'Gross negligence' refers to negligent acts which are aggravated, reckless or flagrant and which are such a departure from what would be the conduct of an ordinarily prudent, careful person under the same circumstances as to be contrary to a proper regard for human life or to constitute indifference to the consequences of those acts. The facts must be such that the consequences of the negligent acts could reasonably have been foreseen and it must appear that the death was not the result of inattention, mistaken judgment or

misadventure but the natural and probable result of an aggravated, reckless or flagrantly negligent act."

The Attorney General argues the issue was not preserved for appeal because appellant neither objected to the instruction nor asked for clarification. "'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' (*People v. Andrews* (1989) 49 Cal.3d 200, 218 [260 Cal.Rptr. 583, 776 P.2d 285].)" (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.)

The Supreme Court recently reaffirmed the objective nature of the test for gross negligence. "'[C]riminal negligence is the appropriate standard when the act is intrinsically lawful . . . but warrants criminal liability because the surrounding circumstances present a high risk of serious injury. Criminal negligence is not a "lesser state of mind"; it is a standard for determining when an act may be punished under the penal law because *it is such a departure from what would be the conduct of an ordinarily prudent or careful person under the same circumstances*.' [Citation.]" (*People v. Robertson*, *supra*, 34 Cal.4th at p. __, [17 Cal.Rptr.3d 604, 613], emphasis added.) CALJIC No. 3.36 was a proper statement of that standard. (See *People v. Burnett* (2003) 110 Cal.App.4th 868, 876-877.)

Thus, CALJIC No. 3.36 is an instruction correct in the law. Appellant was required to object to the instruction or to request clarification in the trial court to preserve this issue for appeal. He failed to do either.

IV

Appellant argues the trial court erred in denying his petition for access to personal juror identifying information after the verdict, to allow his counsel to communicate with the jurors for the purposes of developing a new trial motion. He contends that a poster board containing photographs excluded from evidence was seen being carried out of the jury room by the bailiff.

The applicable procedure is set out in Code of Civil Procedure section 237, subdivision (b). That statute provides that any person may petition for access to juror information (names, addresses, and telephone numbers) on a showing of good cause. The trial court "shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. . . ."

The declaration of appellant's counsel in support of his petition stated: "Shortly after the verdict was rendered, Leticia Rodriguez, wife of Defendant Guillermo Rodriguez, asked me why the poster board with Guillermo's photographs was still in the courtroom. I had advised Mrs. Rodriguez earlier during the trial that these photos were excluded from evidence and would be prohibited from being shown to the jurors. Mrs. Rodriguez informed me that during deliberations she saw the bailiff of Department 'K' transporting the poster board along with the evidence that came from the jury room. She also saw this poster board at counsel table during the jury's deliberations, and again when it was presented to the Clerk of the Court by the bailiff along with the evidence of the trial." No declaration by Mrs. Rodriguez accompanied the petition, but she was present in court when the petition was considered.

The declaration also cited the asserted confusion of Juror No. 7 when the jury was polled, in which that juror originally said that the verdict was not hers, and then answered "yes." Counsel for appellant argued that the juror information was necessary to determine whether Juror No. 7 was coerced into her verdict and whether the jury considered the photographs on the poster which were not in evidence.

When the jury was polled on the murder verdict, each juror was asked to say "yes" if his or her verdict was guilty on that count. At first when the clerk called "Juror No. 7" there was no audible response. The court then asked whether this was her verdict on count 1. Juror No. 7 asked, "Is that manslaughter?" The trial court said, "187, second degree, and the verdict was guilty." Juror No. 7 said "I know." The court said: "You

don't know? Well --" Juror No. 7 interrupted the court and said "Guilty." The court asked whether this was her verdict. She said: "Yes." Juror No. 7 showed no hesitation in indicating that her verdict on count 2, manslaughter, was guilty.

Appellant failed to make a prima facie showing warranting a hearing on his petition for jury information based on the perceived confusion of Juror No. 7. As soon as the court made it clear that the verdict was on the murder charge, she said her verdict was guilty. There was no indication of hesitation, confusion, or coercion.

As to the poster containing excluded photographs, the trial court acknowledged that the defense objection to the photographs was that appellant was laughing in some of them. The court doubted whether such photographs would have had much effect in the case, in light of the blood alcohol and evidence from the criminalists.

The declaration regarding Mrs. Rodriguez's observations of the poster board was vague as to the precise location of the board, the time frame, and the location of the jurors when she saw the poster board. Appellant failed to make a prima facie showing requiring a hearing on the petition and the trial court did not err in denying it.

V

Respondent argues the trial court erred in awarding appellant custody credits since he was convicted of murder, citing section 2933.2, subdivisions (a) and (c). In *People v. Donan* (2004) 117 Cal.App.4th 784, 790, we concluded section 2933.2 prohibits all conduct credit for murders where the crime was committed after that prohibition took effect in 1998. Here, the crime was committed in 2003 and thus appellant was not entitled to conduct credit. (*Ibid.*)

At the sentencing hearing, the prosecutor argued that any defendant convicted of murder is not entitled to credits, whether or not sentence on that count is stayed under section 654. The court asked her if this was correct and she said it was. The trial court then said: "But, otherwise, he does get credits; is that right? Is that good time correct, 36? Or is it more than 36?" Defense counsel then said that he had calculated the credit at 15 percent and the prosecutor said "That would be my belief for the local custody

credits." The abstract of judgment reflects 246 days of actual custody credits and 36 of local conduct credit.

We agree with respondent that appellant was not eligible for the 36 days of local conduct credit under section 2933.2, and modify the judgment accordingly.

DISPOSITION

The judgment is modified and affirmed as modified. The abstract of judgment is amended to reflect only 246 days of actual custody credits.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, Acting P.J.

We concur:

CURRY, J.

GRIMES, J.*

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.